Furthermore, once petitioners to deny are forced to rely on just the raw numbers in Form 395 as a tool for deciding whose EEO bonafides should be tested, it's inevitable that EEO opponents will allege that petitioners to deny really advocate a quota system. Petitioners' sole reliance on Form 395 will degrade the quality, the fairness, and the value of petitions to deny to the FCC. Broadcasters who don't deserve to be targeted will be targeted mistakenly, and broadcasters who do deserve to be targeted will be skipped mistakenly.

Consequently, the Streamining NPRM would impose considerable new costs and burdens on petitioners to deny by making it far more difficult -- indeed almost impossible -- for petitioners to deny to ascertain and adjudicate instances of gross EEO violations, including intentional discrimination.

5. Broadcasters Innocent of Discrimination

It's unfortunate that in its zeal to eviscerate EEO enforcement, some broadcast trade organizations have not thought about how the existence of meaningful EEO data protects innocent broadcasters from erroneous allegations of discrimination and assists broadcasters in securing a steady flow of qualified job applicants.

Without meaningful information on Form 396, petitioners to deny will be guided only by the tiny beacon of information provided by Form 395. Most national civil rights organizations, including LULAC, try hard not to target a broadcaster based solely on its low "numbers", because, like the FCC, we look to EEO efforts as the best evidence of genuine EEO compliance. If "EEO Streamlining" happens, LULAC will still do its best to target the guilty and

excuse the innocent. But if petitioners to deny are given only numbers to go by, it's inevitable that some broadcasters, innocent of EEO noncompliance, will be caught up in the net of good faith petitions to deny.

Furthermore, the higher costs of operation, and greater inefficiencies of operation imposed on community groups by the absence of EEO data, as shown above, will spill over onto broadcasters. Referrals from community groups are free. A reduction in these referrals will impose greater labor search costs on all broadcasters, depriving them of ready access to a broad spectrum of talent.

Finally, the greater incidence of discrimination in the industry will inevitably discourage good and talented people from seeking careers in the field. This brain drain from broadcasting will most seriously burden EEO compliers, who genuinely desire to take advantage of all sources of talent irrespective of race.

6. Broadcast Listeners and Viewers

The FCC's EEO program is intended to provide diversity of voices by insuring that the staffs of broadcasting stations are integrated. Every human resources professional knows that the stream of ideas derived from a business organization is the mixture of the ideas contributed by its tributary persons, the employees. The Supreme Court realizes this too. NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976).

More discrimination and a reduction in minority employment virtually guarantee the resegregation of the airwaves. Anyone listening to the national disgrace called "talk radio" can hardly disagree that a greater diversity of viewpoints, and particularly

the addition of minority viewpoints, would benefit our nation's public discourse.

With the loss of the minority ownership policies, the reduction-in-progress in the number of minority owned stations, and the media concentration being spawned by the Telecommunication Act, the FCC's only remaining pro-diversity protection is the EEO Rule. Thus, the Streamlining NPRM should have recognized and sought comments on the burdens faced by members of the public -- the listeners and viewers -- who desire, expect and deserve to receive the full fruits of the First Amendment from their government-licensed radio and television spectrum.

* * * * *

At this time in our history, when the rights of minorities in the media are under challenge on so many fronts, the FCC ought to be providing leadership. It should be reaching out to the civil rights community for help in developing means of strengthening its EEO enforcement effort. It should be establishing an unequivocal policy of zero tolerance for discrimination.

Most of all, the FCC should be establishing a goal of permanently eliminating discrimination from broadcasting. Had that goal been achieved yesterday, it wouldn't have been soon enough.

LULAC is appalled that the FCC would contemplate a reduction in EEO enforcement, and that the FCC would fail to recognize the burdens that course of action will impose on virtually everyone but a handful of non-EEO complying broadcasters.

This statement is true to my personal knowledge and is made under penalty of perjury under the laws of the United States of America.

Executed April 9, 1996

Eduardo Peña

Eduardo Peña

EXHIBIT 6

PUBLIC NOTICE

Federal Communications Commission
1919 M St., N.W.
Washington, D.C. 20554

News media information 202 / 418-0500
Fax-On-Demand: 202 / 418-2830
Internet: http://www.fcc.gov
ftp.fcc.gov

DA 96-414

Report No. CC 96-10 COMMON CARRIER ACTION March 25, 1996

COMMON CARRIER BUREAU CLARIFIES AND EXTENDS REQUEST FOR COMMENT ON ACTA PETITION RELATING TO "INTERNET PHONE" SOFTWARE AND HARDWARE - RM No. 8775

Comments Due: May 8, 1996
Replies Due: June 8, 1996

On March 4, 1996, America's Carriers Telecommunication Association (ACTA) filed a Petition for Declaratory Ruling, Special Relief, and Institution of a Rulemaking relating to the provision of interstate and international interexchange telecommunications service via the "Internet" by non-tariffed, uncertified entities. ACTA alleges that providers of "Internet phone" software and hardware are operating as uncertified and unregulated common carriers, in contravention of FCC rules, and seeks three forms of relief. First, ACTA seeks a declaratory ruling establishing the Commission's authority over interstate and international telecommunications services using the Internet. Second, ACTA asks the Commission for special relief: to order named and unnamed respondents immediately to stop provisioning Internet phone software and hardware without complying with the regulatory requirements of the Communications Act of 1934. Finally, ACTA urges the Commission to initiate a rulemaking proceeding to consider rules governing the use of the Internet for the provision of telecommunications services.

On March 8, 1996, a public notice was issued seeking comment on ACTA's petition for rulemaking. When petitions for rulemaking are filed with the Commission, a public notice is routinely issued shortly after the petition is filed. The Commission's goal in seeking comment is to develop a record on which to base a decision about whether or not the issues raised by the outside party merit consideration.

We hereby establish a consolidated pleading cycle for all of ACTA's requests. This proceeding will be treated as non-restricted for purposes of the Commission's ex parte rules. See generally 47 C.F.R. §§1.1200-1.1216.

(over)

Because of the complex issues implicated by the ACTA petition, the deadlines for filing comments on the petition are hereby extended. All comments on ACTA's petition should be filed on or before **May 8, 1996**, and all reply comments should be filed on or before **June 8, 1996**. Commenters should file an original and four copies of their comments with the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. A copy should also be sent to Wanda Harris, Common Carrier Bureau, FCC, Room 518, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Informal comments in this proceeding may also be filed via electronic mail to <rm8775@fcc.gov>. All filings in this non-docketed proceeding should reference RM No. 8775. The full text of the petition, and the comments and reply comments will be available for inspection and duplication during regular business hours in the FCC Reference Center, Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D.C. 20554. Copies may also be obtained from International Transcription Service, Inc. (ITS, Inc.), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 (202/857-3800). This public notice and additional information on filing comments will be available on the Internet through the "recent actions" section of the Common Carrier Bureau home page at <http://www.fcc.gov/ccb.html>.

For further information, contact Kevin Werbach, 202/418-1597, of the Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

EXHIBIT 7

ORAL ARGUMENT SCHEDULED
FOR SEPTEMBER 8, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, et al.,	)	
Appellants,	)	
v.	)	No. 92-1159
FEDERAL COMMUNICATIONS COMMISSION,	)	
Appellee	)	

PARTIAL OPPOSITION TO "MOTION FOR REMAND OF RECORD", AND MOTION TO REQUIRE HEARING ON REMAND

Appellants South Carolina State Conference of Branches of the NAACP et al. ("NAACP") respectfully oppose, in part, the Motion for Remand of Record ("Motion") filed May 20, 1993 by Appellee Federal Communications Commission.

Appellants support the Motion insofar as it contains a gracious, albeit untimely acknowledgement of error which essentially confesses that part of the decision below was irrational. Appellants support an immediate remand only if the Commission amends its Motion to manifest its intention to hold a hearing, or if this Court directs the Commission to hold a hearing. Otherwise, Appellants oppose an immediate remand, and ask instead that the Motion be denied and this case be briefed and argued as scheduled.

I. THIS COURT SHOULD INTERVENE TO PREVENT FURTHER PROCEDURAL MISCONDUCT BY THE FCC. IT SHOULD ORDER THE FCC TO HOLD A HEARING IMMEDIATELY.

The heart of the Motion is contained at pp. 1-2:

> A principal issue in this EEO appeal is whether there are any reasonable inferences of possible intentional discrimination that are left unresolved by the Commission's orders granting renewal without an evidentiary hearing....

> In preparing the Commission's brief on appeal, undersigned counsel became concerned that the Commission's order granting renewal has not adequately responded to the argument of [Appellants] that the licensee's record evidences intentional discriminaton. We are particularly concerned with the licensee's performance with respect to the employment of minorities in upper-level positions. Upon further reflection, the Commission has concluded that its present discussion of this matter, as contained in footnote 19 of the Commission's order [Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina, 5 FCC Rcd 1704, 1710 n. 19 (1990) ("South Carolina Renewals"), reconsideration denied, 7 FCC Rcd 1895 (1992) ("South Carolina Renewals - Reconsideration")] is insufficient to justify a decision to renew the licenses at issue here without a further inquiry.

Footnote 19 of South Carolina Renewals observed that the 1988 renewal applications filed by intervenor Ogden Broadcasting of South Carolina, Inc. ("Ogden") for radio stations WGSN-AM and WNMB-FM had reported four upper level (management, professional, sales or technical) hires in the twelve months preceding the filing of the application, and that Ogden had hired only Whites for these positions. Upon Commission inquiry, the licensee acknowledged that there were really nine such hires -- also Whites only. Id. It should have been obvious that Ogden's unexplained and major misrepresentation, running in its own favor, would have tended to distract the Commission's and the public's attention from several other indices of Ogden's abysmal EEO record.

The Commission has long recognized the need to hold hearings when material misrepresentations are used to conceal or detract from EEO violations. See, eg., Albany Radio, Inc., 97 FCC2d 519 (1984); Metroplex Communications of Florida, Inc., 96 FCC2d 1090 (1984) (each holding that such misrepresentations, in addition to being odious in their own right, contribute to the underlying inference of discrimination.) Nonetheless, the offending footnote 19 held that Ogden's EEO program and Ogden's response to the Commission's inquiry

were somehow not inconsistent with one another, since each "showed that all of the hires were white and that efforts were adequate with regard to females but questionable with regard to minorities." South Carolina Renewals, 5 FCC Rcd at 1710 n. 19. Based on this reasoning, the Commission concluded that "we believe there was no intent to deceive which would warrant further inquiry." Id.

How could the Commission, acting in good faith, not have realized that the statements "all of the hires were white" and "[EEO] efforts were ...questionable with regard to minorities" inculpate rather than exculpate Ogden's bald misrepresentation?

The Commission has waited too long to come into court, one day before its main brief was due, to confess error without offering a comprehensive review of what is and is not defensible about its decision.1/ Footnote 19 is important, but as shown in Appellants' Brief, the Commission's decisions contain errors even worse than

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1/ Such an explanation was especially appropriate in light of D.C. Cir. Rule 11(f)(2) (motion to extend time for filing briefs must be filed at least ten days before the main briefs are due to be filed.) Indeed, the Commission should have known months or years ago that its decision was irrational. After waiting two years for a decision on reconsideration of even more serious errors than that in footnote 19, the NAACP noted its appeal on April 10, 1992. Therein it manifested its intention to argue, inter alia, "[w]hether the Commission violated 47 U.S.C. §309, and departed without reasonable explanation from its own precedents, in refusing to designate for hearing renewal applications after its investigation revealed...(2) deliberate and unexplained misrepresentations in the EEO Program filed with the FCC...." See also Appellants' "Statement of Issues to be Raised," April 28, 1992 (to the same effect). For over a year thereafter, the Commission still did nothing. Only after the NAACP committed the enormous effort entailed in filing a 43 page brief did the Commission finally recognize that footnote 19 cannot be rationally defended in this Court. See n. 16 infra (discussing this Court's reluctance to permit delay absent extraordinarily compelling reasons.)

that in footnote 19.[2] Piecemeal embellishments will only waste more time. This case has dragged on for almost five years and still has not been set for trial. The entire decision is indefensible.

Appellants enthusiastically agree that the record should be remanded. However, that remand should not occur without words of guidance. This Court should instruct the Commission to stop delaying the prompt resolution of the NAACP's discrimination charges and hold a hearing.

This Court's guidance and continued oversight are needed because the Commission's troubling conduct in this case is regrettably very similar to its conduct in EEO case after EEO

2/ South Carolina Renewals also held that designation for hearing was not required because the radio stations "did employ blacks in significant positions through 1986, and there are no substantial and material questions concerning the departure of those employees." Id. at 1708 ¶38. Yet the Commission failed even to notice that those employees soon mysteriously disappeared. The Commission never even asked Ogden why they left, or where they went. That information was essential to any meaningful investigation. See Beaumont NAACP v. FCC, 854 F.2d 501, 505 (D.C. Cir. 1988) ("Beaumont"). When the NAACP complained of this in its petition for reconsideration, the Commission took two years to issue the following irrelevant observation: "[i]n its responses to the petition to deny, the licensee describes the minorities employed at the beginning of the license term and stated that each departed voluntarily for other job opportunities." South Carolina Renewals - Reconsideration, 7 FCC Rcd at 1896 ¶11. How that answers the NAACP's complaint that the Commission should have found the missing former minority employees is still a mystery.

The Commission's reconsideration decision also acknowledged -- for the first time -- that the NAACP had shown that Ogden hired no Blacks out of 53 hires. Id. at ¶4. However, the Commission's only response was the erroneous assertion that it had "fully considered [the NAACP's] allegations regarding the licensee's minority recruitment and hiring record and took them into account when it issued [South Carolina Renewals]." South Carolina Renewals - Reconsideration, 7 FCC Rcd at 1896 ¶¶4, 11.

Appellants deserved far better from the agency. To put it gently, this record is "beyond repair." Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 547 (D.C. Cir. 1969). The Commission has continued its long and tortured tradition in EEO and civil rights cases of a "curious neutrality in favor of the licensee." Id.

case.3/ The NAACP, whose resources are quite limited, never should have been put to the trouble of seeking reconsideration and noting an appeal -- much less filing a 43 page main brief.

3/ The FCC staff and the public possess the same EEO information -- annual employment reports and renewal-time EEO programs. Nonetheless, the FCC has all but delegated to the NAACP the task of reviewing this publicly available data, screening it, and determining which broadcast stations need further EEO scrutiny.

Since 1981, there have been only four instances in which the FCC conducted investigations under Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 630 (D.C. Cir. 1978) ("Bilingual") on its own or issued EEO sanctions without the prodding of a petition to deny. There have, however, been dozens of minor sanctions issued as a result of petitions to deny.

After deregulation, EEO compliance is now essentially the only criterion the FCC applies at license renewal time to make the affirmative public interest determination required by Section 309 of the Communications Act. See Deregulation of Radio, 84 FCC2d 968, recon granted in part, 87 FCC2d 797 (1981), aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983). See also discussion in Appellants' Brief in this case, at 21-23, describing why EEO regulation has become even more crucial to the Commission's regulatory regime.

In 1987, after years of neglect, the FCC finally began to comply with this Court's 1978 requirement that it investigate further when EEO performance is insufficient or declining and an EEO program is neutral or ineffective. Bilingual, supra, 595 F.2d at 630. The Commission has initiated Bilingual investigations in virtually all of the roughly 200 instances in which the NAACP filed EEO-based petitions to deny since 1987.

As commendable as it is that the FCC finally began to comply with this court's 1978 Bilingual mandate, its performance since 1987 has repeatedly reflected a failure to perform meaningful Bilingual investigations. This is still agency noncompliance, albeit pushed back another level in the administrative process. See Beaumont, supra, 854 F.2d at 505 (chastising the Commission for failing to hold a hearing when a licensee's renewal application made EEO claims directly at odds with representations made in response to a Bilingual investigation).

The facts of this case are every bit as egregious as those in Beaumont and WXBM-FM, Inc. (Hearing Designation Order), 6 FCC Rcd 4782 (1991) ("WXBM") (designated for hearing on a record materially indistinguishable from that here.) Beaumont involved employee terminations, refusals to hire and misrepresentations; this case also involves these three factors. WXMB involved refusals to hire and misrepresentations. Beaumont and WXBM are intellectually indistinguishable from this case.

Discrimination in broadcasting is quite pervasive. The effort expended uselessly filing a brief in this Court could have been better spent on other NAACP activities -- such as encouraging minorities to pursue broadcast careers, working cooperatively with broadcasters to foster voluntary EEO compliance, and litigating other discrimination cases.[4/]

With the greatest respect, the NAACP manifests its appreciation that the Commission's appellate counsel realized that the decision below is seriously flawed. Indeed, this Court should warmly commend Commission counsel for his remarkable, intellectually honest, and gracious acknowledgement of the agency's error.

Other Commission officials should have noticed much earlier that something was wrong with this case. Ogden's misconduct was so grave, so morally offensive, and cut so deeply into the heart of the Commission's system of licensing that the agency's inaction until now exposes a fundamental flaw in its review of EEO complaints. Indeed, this is not the first broadcast EEO case in which the NAACP has had to file a full brief in this Court before the Commission asked for the record back.[5/]

4/ An illogical ruling in an EEO case is particularly troubling because FCC EEO cases aren't that specialized. They are hardly comparable to highly technical FCC ratemaking cases. The wrong complained of here was race discrimination by a broadcast licensee in South Carolina, a licensee which had 53 vacancies but hired no minorities for them, a licensee which misrepresented its own record in order to evade review, a licensee which did not even implement its EEO program as plainly required by the EEO Rule (47 CFR §73.2080) and by years of unbroken case precedent. It should have been easy for the FCC to figure out what to do.

5/ Indiana/Kentucky/Tennessee License Renewals, 53 P&F Rad. Reg. 2d 1473 (1983), recon. denied sub nom. WVLK, Inc., 84-431 (released September 18, 1984), appealed sub nom. National Black Media Coalition and the Lexington-Fayette Branch of the NAACP v. FCC, No. 84-1518 (1985) (remanded on appellee's motion).

Again and again, this Court has found it necessary to instruct the Commission on matters of elementary logic and rationality in EEO cases.[6] Until the Commission accepts its EEO enforcement responsibilities, this Court and the civil rights organizations who appear before it will continue to have their time wasted with cases like this one. This Court should not be the tribunal of first resort for victims of race discrimination by federal licensees.

Is the Commission's extraordinary delay in this case a fleeting aberration? But that it were so. Appellants wish they could be forgiving of the Commission's mishandling of this matter. But they can't. The Commission's cavalier treatment of this case is but a small part of a longstanding pattern of willful and repeated[7] Commission misbehavior when minorities raise policy matters in papers before the agency. Regrettably, the Commission has exhibited an extraordinary propensity for procedural irregularity in handling papers filed by minorities and civil rights organizations, as shown

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6/ Beaumont, supra (instructing Commission that inconsistent explanations for EEO misconduct require exploration in hearing); NBMC v. FCC, 775 F.2d 342 (D.C. Cir. 1985) (instructing Commission that EEO record compiled while under scrutiny from petitioners to deny cannot be used to predict future, unscrutinized performance); Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59 (D.C. Cir. 1977) (instructing Commission that the absence of Blacks except as the janitor at a major Richmond, Virginia TV station must be explored in hearing); see Tallahassee NAACP v. FCC, 870 F.2d 704, 710 (D.C. Cir. 1989) (Commission may not ignore minority exclusion at co-owned stations on the pretext that those stations' renewals are not before the Commission at that moment.)

7/ The Commission uses the "willful and repeated" standard to evaluate the character of its own licensees. See Southern California Broadcasting Co., 6 FCC Rcd 4387 (1991) ("willful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law") (quoting H.R. Rep. No. 765, 86th Cong., 2d Sess. 51 (1982)); Hale Broadcasting Corporation, 79 FCC2d 169, 171 (1980) (repeatedly "means simply more than once.")

by twelve examples set out in the margin.[8/]

8/ Here are twelve examples of Commission misconduct involving minorities and minority issues.

1. Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265 (First Report and Order), FCC 93-1789 (released April 30, 1993) (failing even to acknowledge the existence of the extensive comments of the only minority party, the Caribbean Satellite Network, Inc. ("CSN"), which raised several issues raised by no other party. One of the issues raised by CSN was the need to foster minority ownership of cable networks. The order did not even include CSN in the appendix listing the commenters. See 5 U.S.C. §§553(c); 47 CFR §1.415(a), 47 CFR §1.425.

2. Review of the Technical Assignment Criteria for the AM Broadcast Service, MM Docket No. 87-267, Report and Order, 6 FCC Rcd 6273 (1991), recon denied, FCC 93-198 (released April 29, 1993). In its Report and Order, the Commission refused to adopt minority ownership incentives for occupancy of the 1605-1705 kHz "AM Expanded Band," albeit minority ownership was among the primary justifications for the band expansion asserted by the FCC and the State Department when negotiating for the band expansion at the 1979 World Administrative radio Conference. The FCC's initial order failed to acknowledge the existence of, much less respond to, the extensive comments of the NAACP, LULAC and the National Black Media Coalition ("NBMC") on this issue; these parties were not even included in the appendix listing the commenters. Recognizing the Commission's aversion to minority incentives in the expanded band, the civil rights organizations filed a petition for reconsideration which advanced an alternative proposal less sweeping than their original one. In its reconsideration order, the Commission rejected the new proposal, chastising these organizations for putting forward the compromise proposal in their petition for reconsideration because they "should have been submitted earlier as a comment in response to the NPRM" -- that is, as part of the same initial comments which the Commission's initial order had disregarded. (!) Reconsideration Order, FCC 93-198 at 11 ¶37. Adding insult to this, as a justification for refusing to adopt minority incentives, the Reconsideration Order cited a 1992 ruling which it claimed had "address[ed] the need to increase opportunities for minority ownership." Reconsideration Order, FCC 93-198 at 11 37. The ruling in question, Revision of Radio Rules and Policies, 7 FCC Rcd 6387 (1992) accomplished precisely the opposite: it was unanimously opposed by minority groups and minority broadcasters as sounding the death knell for minority radio ownership by fostering concentration in local media markets. See J. Flint, "Minorities see an Indifferent FCC," Broadcasting, August 24, 1992, pp. 25-26.

(n. 8 continued on p. 10)

8/ (continued from p. 8)

3. Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 FCC Rcd 3192 (Gen. Counsel, 1992) (revising comment dates). In a proceeding aimed at revising the substantive weights of comparative factors in new broadcast licensing hearings, the Commission promptly and favorably considered a petition for rulemaking filed by nonminorities seeking to dilute the minority ownership policies which Congress had forbidden the Commission to reevaluate or diminish. However, the Commission completely ignored a mutually exclusive proposal filed by the NAACP, LULAC and NBMC, seeking stronger minority incentives. When the civil rights organizations complained, the Commission allowed just one additional week for public comment. Id. (acknowledging that "while the [nonminority] proposal was assigned a Rule Making number, the proposal of NAACP et al. inadvertently was not.") Yet the Commission still did not -- as it had done for the nonminority petition -- include in its order soliciting comments what the civil rights organizations' petition for rulemaking was about or what its merits might be. Id.

4. Petition for Rulemaking of the Coalition to Improve tax Certificate Policies (filed June 23, 1992). This pro-minority ownership rulemaking petition was filed by a former General Counsel of the National Association of Broadcasters for several minority broadcasters, including Broadcast Capital Fund, Inc., Black entertainment television, inc., Granite Broadcasting Corporation, and U.S. Radio, L.P., along with the National Association of Media Brokers. It still has not been stamped in with a rulemaking petition file number ("RM number") which would enable the public to file comments for and against the proposal. Without an RM number, the public cannot comment on a proposal, and the Commission cannot rule on it. 47 CFR §1.403. Assignment of an RM number is a ministerial act carrying no substantive significance or implied agency endorsement; it typically is announced with a one sentence description of the petition. A 1992 analysis by the NAACP found that RM numbers are typically assigned within about 45 days of the filing of petitions for rulemaking.

5. Petition for Rulemaking on Minority Ownership of Broadcast Facilities, filed September 18, 1990 (not a misprint) by the NAACP, LULAC, NBMC and the National Hispanic Media Coalition ("NHMC"). This three year old rulemaking petition, containing eleven substantive proposals to advance minority ownership in broadcasting and cable television, still has not been stamped in with an RM number. Two sets of visits by civil rights organization representatives to each commissioner's office, begging for the required RM number, were unavailing.

(n. 8 continued on p. 10)

8/ (continued from p. 9)

6. NAACP Petition for Rulemaking on the Use of Beepers in the Drug Trade (RM-6619, filed November 3, 1988). Few things should be as noncontroversial as a proposal to require that parents or guardians take responsibility for their children's beepers. In ghettos and barrios, non-parentally supervised beeper use among children is commonplace. Drug dealers hire children to make crack and heroin deliveries, using beepers to signal when to make drops and deliveries. The NAACP's Petition languished for weeks without an RM number until the Commission's Secretary, in the company of undersigned counsel, physically removed it from a staff attorney's desk and stamped it in. The beeper industry trade organization opposed the petition. It has gathered dust for nearly five years without even a preliminary ruling. It is now apparently the oldest RM-numbered petition still awaiting even preliminary Commission action.

7. NBMC v. FCC, 791 F.2d 1016 (2d Cir. 1986). The Second Circuit reversed the Commission's decision to eliminate the pro-minority ownership "clear channel eligibility criteria" in former 47 CFR §73.37(e), holding that it had failed to provide notice of its intention to abandon the pro-minority policy and had relied on an analysis of maps which it failed to make public until after it issued its decision.

8. PTL of Heritage Village Church and Missionary Fellowship, Inc., Report No. 18597 (1992), recon. denied, 53 P&F Rad. Reg. 2d 824 (1983), appeal dismissed sub nom. NBMC v. FCC, 760 F.2d 1297 (D.C. Cir. 1985). The initial 4-3 decision in this case resulted from an investigation under 47 U.S.C. §403 into Jim Bakker's solicitation of funds over FCC licensed facilities, including a Canton, Ohio television station controlled by him. See PTL of Heritage Village Church and Missionary Fellowship, Inc., 71 FCC2d 324 (1979). Bakker had solicited the funds to support overseas ministries, but actually used the funds for such items as gold toilet fixtures in his mansion. Normally, PTL would have been unable to sell its television station. Jefferson Radio Corp. v. FCC, 340 F.2d 781 (D.C. Cir. 1964) However, PTL could have availed itself of the distress sale policy, which enables minorities to buy a station out of a hearing at a discount. Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978). The NAACP, NBMC, the National Association of Black Owned Broadcasters ("NABOB") and the Office of Communication of the United Church of Christ sought reconsideration, which was denied by a 4-1 vote. The reconsideration order was properly served on PTL's counsel but was never served on the civil rights organizations' counsel, one of whom accidentally learned of the ruling seven days after the time to appeal had run. This Court had no choice but to affirm based on untimeliness. NBMC v. FCC, supra (construing 47 U.S.C. §402(b)).

(n. 8 continued on p. 11)

8/ (continued from p. 10)

9. NLT Corp., 54 P&F Rad. Reg. 2d (1982) ("NLT"). This extraordinary case involved NBMC's challenge to a multibillion dollar insurance company merger involving two radio stations accused of employment discrimination. See WSM, Inc., 66 FCC2d 994, 1006-1008 ¶¶29-32 (1977). [The Title VII and §1981 litigation concluded in 1989 with final court orders of discrimination against three Black victims.] NBMC also alleged that one of the insurance companies appealed to the racial prejudices of advertisers to discourage the nation's largest Black owned insurance company from acquiring a competing TV station. NBMC's challenge delayed consummation of the merger. The stock value of one of the insurance companies reportedly fell by approximately $240,000,000 the day after the challenge was filed. A few days thereafter, NBMC's lawyer, Lonell Johnson, whose noncontroversial practice theretofore had involved mostly estate matters for Black churches, was professionally executed. A few days after his murder, various files relating to the case, including some in the possession of undersigned counsel in the instant case (who was clerking for Mr. Johnson) were stolen by professional burglars who simultaneously invaded the undersigned's house and office and Mr. Johnson's secretary's house. When NBMC was unsuccessful in persuading the FBI to investigate, NBMC asked the Commission to ask the FBI to do so. Lonell Johnson's murder, which may have been the ultimate abuse of the Commission's processes, was not even mentioned by the Commission in NLT. Nor was NBMC's request for FCC assistance in obtaining FBI intervention mentioned, much less acted upon. However -- in a sharp contrast to its turtle speed handling of the instant EEO case -- the Commission did manage to rule against the petition to deny and simultaneously issue the full text of the ruling a record nine days after the close of briefing. The broadcast applicants were tipped off in advance about the ruling, enabling them to complete their merger by electronic funds transfer two seconds after the release of the NLT text. NBMC was not notified, thereby insulating the Commission from injunctive relief. The Commission's nine-day speed record in an EEO case, established in NLT, still stands.

10. Petition for Rulemaking on Minority Ownership, filed in November, 1981 by NABOB. This petition by the nation's largest organization of minority owned broadcasters sought, inter alia, an expansion of the Commission's minority ownership distress sale policy. See Statement of Policy on Minority Ownership of Broadcast Facilities, supra, 68 FCC2d at 983. Although no party opposed NABOB's Petition, it was still allowed to languish for five years. It was finally was dismissed in 1986 because of the staleness of the record and because the FCC suspended the distress sale policy. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (distress sale policy found not to offend equal protection).

(n. 8 continued on p. 12)

8/ (continued from p. 11)

11. Pacifica Radio, Inc. (unpublished order, Chief, Mass Media Bureau, 1981). A conservative public interest law firm, American Legal Foundation ("ALF") challenged the license renewal application of the Black-managed, liberal Washington, D.C. noncommercial station WPFW-FM. ALF urged the FCC to revoke WPFW-FM's license primarily because the station frequently broadcast viewpoints opposite to those of the law firm. NBMC came to the station's defense with a detailed 25 page amicus brief. The Commission's decision imposed various admonishments upon the licensee, but in doing so never ruled upon, nor even noted the existence of NBMC's brief.

12. Petition for Rulemaking on Minority Ownership of Broadcast Facilities, filed by NBMC November 22, 1981 (unfortunately, this is not a misprint.) This extensive Petition contained fourteen proposals to advance minority broadcast station ownership. It is still lacking an RM number even after NBMC complained of the absence of the RM number at a February, 1984 en banc Commission hearing. Several subsequent NBMC requests for a file number were also unavailing. The Petition still patiently awaits its RM number.

This partial list excludes pending adjudicative proceedings. Appellants represent to this Court, however, that similar examples may be found embedded within several of them.

The FCC is not fundamentally corrupt. Indeed, fairness requires that Appellants point out that the FCC's dirty tricks since 1981 are not typical of the FCC's history. These dirty tricks reflect instead the misguided actions of a handful of FCC officials possessed of but a limited understanding of the concept that even those with whom an agency disagrees are entitled to the courtesies of procedural due process.

To be fully understood, the FCC's misconduct must be placed in its historical context.

The defining events in the FCC's history of dealing with minority access were this court's landmark decisions in Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("UCC I") (ordering the FCC to hold a hearing on charges that WLBT-TV, Jackson, Mississippi, discriminated against Blacks in program service) and Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) ("UCC II") (vacating order renewing racist WLBT-TV's license renewal because record was "beyond repair").

Before 1981, when an FCC Chairman hostile to minority interests assumed office, the FCC's handling of minority media policy cases was never infected by the dirty tricks illustrated by the twelve examples in this footnote. Until 1981, Republican and Democratic FCC administrations were uniformly ethical in applying procedural evenhandness to papers filed by minorities.

(n. 8 continued on p. 13)

Appellants complain not of substantive policy disagreements or adverse merits rulings. Appellants acknowledge that parties are not entitled to an agency which agrees with them philosophically. They could not fault the Commission if they lost every case fair and square rulings which were principled, clearly articulated, timely issued and timely released.

8/ (continued from p. 12)

Even before 1981, minority media issues were handled at a glacial pace, due to their low priority on the Commission's policy agenda. See Citizens Communications Center, 61 FCC2d 1095, 1103 (1976) (Statement of Commissioner Benjamin L. Hooks, Dissenting in Part to the denial in toto of a 62 point rulemaking petition filed by NBMC, declaring that "it is all but inexcusable for this Petition to have been unanswered for a period approaching three years. When the Commission is accused by its detractors of being unresponsive to the public interest groups, the procrastination here can be pointed to as a sterling example of studied inaction.") Yet with the exception of the kangaroo court hearing whose outcome was vacated in UCC II, and apart from serious delays in rulings, the FCC's pre-1981 treatment of minorities was without serious procedural taint.

This is remarkable when one recalls the open anti-minority (and, for a time, anti-Semitic) behavior the FCC exhibited until this Court rang in the 20th Century with UCC I and UCC II. See The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965) (rejecting the allegations of that well known defender of civil rights, the Federal Bureau of Investigation, that a radio licensee used its airwaves to urge White Mississippians to descend upon Oxford, Mississippi and use violence to prevent the enrollment of James Meredith, thereby contributing to the deaths of two people in the resulting violence); Broward County Broadcasting, 1 P&F Rad. Reg. 2d 294, 296 (1963) (designating for hearing the license of a small Florida station which proposed to address a small portion of its programming to the Black community, because local White citizens had complained that the station was licensed to an all-White town which didn't need that type of music. When the station dropped the programming, the Commission quietly dropped the charges); Southland Television Co., 10 P&F Rad. Reg. 699 (decided 1955, reported 1957), recon. denied, 20 FCC 159 (1955) (giving full faith and credit to Louisiana laws segregating theaters in rejecting racially integrated TV station applicant's challenge to competitor who owned segregated movie theatres and a segregated drive-in); Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938) (Commission rejected the only applicant for a radio license because some of its proposed programming was in Yiddish and intended for Jewish immigrants); see also Voice of Brooklyn, 8 FCC 230, 248 (1940) and Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936) (to the same effect). Yet even in the 1950s, when comparative broadcast hearing cases were routinely fixed, nobody accused the FCC of violating its procedural rules specifically to hurt minorities.

Yet that is not how the FCC always operates when minorities are litigants in policy proceedings. The FCC rules on the merits when it chooses. Otherwise it simply throws the papers in the refuse rather than into the record. When minorities appear before it on policy matters, the FCC frequently commits flagrant violations the APA, the Communications Act and its own rules, offending elementary norms of procedural due process. Alegria I, Inc. v. FCC, 905 F.2d 471, 474 (D.C. Cir. 1990) ("Alegria I") (it is a "well accepted principle that agencies must follow their own rules.")

Appellants know this might be painful to accept.[9/] This Court normally assumes the regularity of process by agencies appearing before it. Regrettably, that regularity cannot always be assumed when minorities are appellants and the FCC is the appellee. If a private citizen or corporation behaved the way the FCC often behaves when minorities and minority issues are involved, it would be subject to sanctions.[10/] If procedural dirty tricks such as those in n. 8 supra happened to television networks, Baby Bells or cable MSOs, this Court would have been flooded with complaints long ago.[11/]

9/ Much like victims of sexual harassment, the NAACP has endured these FCC procedural abuses for years, out of fear that complaining about them will only trigger further abuse or harden the agency's anti-civil rights philosophy. No more. The NAACP participates in proceedings before dozens of agencies and tribunals, and finds that the Federal Communications Commission's irregular treatment of papers filed by minorities is unique in the federal government. No matter how vigorously the NAACP has disagreed with policies at other federal agencies, no federal agency other than the FCC repeatedly discards the papers or ignores the arguments of minority groups, in open violation of the APA and its own governing statute and rules.

10/ The NAACP reserves the right to file an appropriate sanctions motion. See D.C. Cir. Rule 23.

11/ For a rare example, see WLOS TV, Inc. v. FCC, 932 F.2d 993, 998 (D.C. Cir. 1991) (Concurring Opinion of Judge Silberman) ("Appellant suggests that its client is the target of a personal grudge held by senior officials in the agency. Normally I would discount such a claim, but the agency's handling of this case is so inexplicable otherwise that appellant's suggestion is troubling.")

Consequently, the NAACP respectfully requests this Court to issue an order remanding the record, but firmly requiring:

(1) that the Commission issue its supplemental order in no less than 60 days;

(2) that its supplemental order fully address all issues raised in appellants' brief in this Court;

(3) that its supplemental order designate this case for hearing;

(4) that the Commission direct an ALJ to schedule trial of this case before June 1, 1994 and undertake to issue an initial decision by December 31, 1994;[12/] and

(5) that progress reports be filed every 45 days, as suggested in the Commission's Motion.

Unless this Court orders the Commission to try this case, no trial will occur. While the Motion acknowledged error, it did not acknowledge the need for a hearing on the ultimate question of whether Ogden is qualified to have its license renewed. Apparently, after all these years, the Commission still has no intention of holding such a hearing unless forced to do so. If the Commission intended to hold a hearing, the Motion would have said so instead of vaguely promising to undertake a "further inquiry" and "to seek further consideration of the licensee's performance." Motion at 2.

After what the Commission has put Appellants through, it would be an uncommonly unkind twist of fate if the Commission put a band-aid on footnote 19, reaffirmed its renewability decision, and forced Appellants to start all over again.

Normally, when it is unable to make the affirmative renewability determination required of it by Section 309 of the Communications Act, the Commission has discretion to gather evidence through a hearing or through a Bilingual investigation, which in turn can lead to a hearing. Here, however, the Commission has

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12/ This will enable the witnesses to testify before they expire

already conducted its Bilingual investigation. That investigation obtained most of the potentially available paper documentation of Ogden's EEO misconduct. Yet, as candidly acknowledged by its counsel, even after conducting its Bilingual investigation, the Commission did not make a rational Section 309 renewability determination. Commission counsel could well have gone farther: the agency did not make a rational renewability determination because it cannot do so on the record before it.

It follows that the only course of action lawfully available to the Commission is designation of this matter for hearing. See 47 U.S.C. 309(e). Discovery in such a hearing could be expedited, since Ogden has already produced extensive paper documentation. The evidence not yet before a finder of fact is Ogden's subjective intent when it hired 53 Whites in a row, failed to implement its EEO program, and deliberately understated the number of job openings when filing its renewal application. Scienter is determinable only in the crucible of a hearing, through direct and crossexamination.

Thus, while the Commission certainly has discretion to undertake yet another round of pretrial investigation, such an exercise would be a further waste of time. The witnesses are getting old, and their recollections are growing faint. Even if a trial commenced tomorrow, witnesses would have to remember events occurring ten years ago. Ogden became the licensee of the subject radio station WGSN(AM) in 1983 and WNMB-FM in 1982. Its misconduct under review covered the subsequent period concluding with the November 1, 1988 filing of to the Petition to Deny. Almost five years later -- eleven years after the misconduct began -- we haven't

even gone to trial yet![13] Appellants wonder when the Commission will realize that justice delayed is justice denied. See Brown v. Board of Education, 347 U.S. 483 (1954).[14]

It would be shameful if the Commission were to call the record back only to whitewash it further on remand with a post hoc rationalization for its decision. That tactic would only succeed in enabling the Commission to accomplish through a third merits ruling what it knows it cannot do in this Court.[15] Such a course of action would be an abuse of this Court's discretionary graciousness in allowing agencies to confess and correct their errors.[16] It would only waste more time, forcing yet another trip to this Court, and

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13/ Indeed, the length of time between a petition to deny alleging EEO violations and the resolution of these petitions is so long that one applicant recently moved for recission of a forfeiture because it was issued after the three year statute of limitations for forfeitures. Midwest Management, Inc. (WNTA(AM)/WKMQ-FM, Rockford and Winnebago, IL) Response to Notice of Apparent Liability, filed October 21, 1992 (seeking reconsideration of Champaign, Illinois Renewals, 7 FCC Rcd 7170, 7174 ¶28 (1992)). This is a sure sign of an EEO docket which is out of control.

14/ The FCC recently reaffirmed that "seeking to avoid delay in the initation of new service to the public is clearly a factor pertinent to the public interest." Anchor Broadcasting Limited Partnership, 8 FCC Rcd 1674, 1677 n. 20 (1993). This Court should remind the Commission that delay in the initiation of nondiscriminatory service to the public is also a factor pertinent to the public interest.

15/ Arguments advanced for the first time in an appellee's brief or at oral argument are properly rejected as the post-hoc rationalizations of counsel. Alegria I, supra, 905 F.2d at 474.

16/ This Court frowns upon eleventh hour motions affecting the oral argument calendar. See Order, April 1, 1992 (requiring submission of initial post-docketing papers, and requiring motions "which would affect the calendaring of this case" to be filed by May 14, 1992); Order, February 16, 1993 (scheduling oral argument) ("[b]ecause the briefing schedule is keyed to the date of argument, the Court will grant requests for extension of time limits for briefs or transcripts only for extraordinarily compelling reasons."); D.C. Cir. Rule 11(f)(1); see also D.C. Cir. Rule 11(f)(2) and D.C. Cir. Rule 11(f)(3). Thus, the only reason Appellants have not opposed the Motion altogether is that sending the case back for trial would save time.